

## LIABILITY FOR LOSS BY FIRE AMONG INSURER, TENANT AND LANDLORD

It is a general practice for a property owner to insure his property against loss by fire. The insurance company has an equitable right of subrogation to any cause of action against a third party who negligently causes loss by fire. When property is leased, the lease quite often contains a covenant to return the premises in good repair with an exception of loss by fire. The purpose of this inquiry will be to determine whether such an exception in a lease coupled with a contemplation that the lessor will insure the premises, will exonerate the lessee from liability for any fire loss proximately caused by his own negligence. This presents a policy issue of current significance as to whether an insurance company, by exercising its right of subrogation, can shift such risk of loss to the negligent tenant. Since 1950 the Eighth Circuit Court of Appeals, the highest courts of Ohio, North Carolina, Missouri, Illinois, and a district court in Pennsylvania, have considered this problem. The insurance companies were the real parties in interest and, for the most part, instigated the litigation.

This comment will include discussions of covenants in a lease, public policy, the effect of insurance on the liability of the parties, an analysis of the pertinent cases, Ohio law, and a conclusion. It should be noted that the following comment will apply only to ordinary negligence on the part of the tenant, and not to wilful or grossly negligent conduct.

### THE TENANT'S LIABILITY

At common law a tenant was not liable for negligent or accidental loss by fire. By the Statute of Gloucester a lessee for life or years was made liable for such loss. The law was changed again by 6 Elizabeth under which a lessee was not liable for accidental loss by fire except in cases of special agreement.<sup>1</sup> Therefore, under a lease without any covenant to repair or to return in good condition, the lessee is only required to use reasonable diligence in care of the premises<sup>2</sup> and is not liable for loss occasioned by accidental fires; but he is liable if the property is destroyed through his negligence.<sup>3</sup> If the injury is accidental, neither landlord nor tenant has the duty to repair in England and the

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<sup>1</sup> See *Warner v. Hitchens*, 5 Barb. 666 (N.Y. Sup. Ct. 1849); 1 Thomas's Lord Coke's First Institute 644; annot. L.R.A. 1918A 369.

<sup>2</sup> The tenant is liable for fair and tenant-like repairs which prevent decay and delapidation, such as keeping buildings wind and water tight, but is not liable for ordinary wear and tear. *Patton v. United States*, 139 F. Supp. 279 (W. D. Pa. 1955).

<sup>3</sup> *United States v. Bostwick*, 94 U.S. 53 (1876); *Miller v. Miller*, 217 Miss. 650, 64 So. 2d 739, 38 A.L.R. 674 (1953); 32 AM. JUR., *Landlord and Tenant* §366 at p. 1079 (1947). For a discussion of the cases see 10 A.L.R. 2d 1023 (1950).

United States;<sup>4</sup> nor, by the better view, would the tenant be liable for the acts of a stranger.<sup>5</sup>

The common law duty of reasonable care may be modified by a general covenant to repair or surrender the premises in as good condition as when received. The unqualified use of this covenant imposes an absolute obligation to repair or rebuild upon the lessee, irrespective of the cause of destruction.<sup>6</sup>

To alleviate the extreme harshness of such strict liability to repair or rebuild, certain specified exceptions are inserted in the lease to relieve the tenant from liability for injury due to the excepted cause.<sup>7</sup> The covenant to repair and the exception are generally construed together so that the covenant is modified by the exception.<sup>8</sup> Where there is an exception from loss due to ordinary wear and tear, the elements, unavoidable casualty, acts of God, or unavoidable accident, the net effect is to impose a duty of ordinary care on the tenant.<sup>9</sup> There is a conflict of authority whether some of these exceptions will include loss caused by accidental fire and thereby exonerate the lessee.<sup>10</sup> The lessee, however, will not be relieved from liability for a fire negligently caused under these general exceptions.<sup>11</sup> When "fire" is specifically excepted it is generally held that loss from accidental fire will fall within the exception and the lessee will not incur liability for the loss.<sup>12</sup> The application

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<sup>4</sup> 6 WILLISTON, CONTRACTS, §1967 at p. 5519 (Rev. Ed. 1936). But in civil law the tenant is not liable for rent and the landlord has the duty to repair since a lease is looked on as a contract instead of a conveyance. *Ibid.*

<sup>5</sup> RESTATEMENT PROPERTY §146 (1936). Also see 5 AMERICAN LAW OF PROPERTY §20.13 (Casner ed. 1952). *Contra*, *Powell v. Dayton R. Co.*, 16 Ore. 33, 16 Pac. 863 (1888).

<sup>6</sup> *Anderson v. Ferguson*, 17 Wash. 2d 262, 135 P. 2d 302 (1943); *Kirby v. Davis*, 210 Ala. 192, 97 So. 655 (1923); 6 WILLISTON, CONTRACTS §1967 (Rev. Ed. 1936); 32 AM. JUR., *Landlord and Tenant* §791 at p. 675 (1941); 51 C.J.S., *Landlord and Tenant* §368 at p. 1099 (1947); 1 AMERICAN LAW OF PROPERTY §3.79 at p. 349 (Casner ed. 1952).

<sup>7</sup> See *Brophy v. Fairmont Creamery*, 98 Neb. 307, 152 N.W. 557, L.R.A. 1918A 367 (1915). For a collection of cases dealing with this question, see 45 A.L.R. 60 (1926) and 20 A.L.R. 2d 1351 (1951).

<sup>8</sup> *Miller v. Belnap*, 75 Idaho 46, 266 P. 2d 662 (1954).

<sup>9</sup> See *Ten Six Olive, Inc. v. Curley*, 208 F. 2d 117 (8th Cir. 1953). 6 WILLISTON, CONTRACTS §1967 (Rev. Ed. 1936) note 4; 51 C.J.S., *Landlord and Tenant* §368 at p. 1102, §414 at p. 1162 (1947).

<sup>10</sup> "Wear and tear" does not include accidental fires. *McKinley v. Jutte and Co.*, 230 Pa. 122, 79 Atl. 244 (1911). "Wear and tear excepted" does not obligate the tenant to rebuild in case of accidental loss by fire. *Howeth v. Anderson*, 25 Tex. 557, 78 Am. Dec. 538 (1860). Also see 32 AM. JUR., *Landlord and Tenant* §811 (1941); 51 C.J.S., *Landlord and Tenant* §368 at p. 1102 (1947).

<sup>11</sup> *Salina Coca-Cola Bottling Corp. v. Rogers*, 171 Kan. 688, 237 P. 2d 218 (1951). "By the elements" includes fire occurring without fault, but not by negligent acts of a stranger. *Polack v. Pioche*, 35 Cal. 416, 95 Am. Dec. 115 (1868); 51 C.J.S., *Landlord and Tenant* §368 at 1102 (1947).

<sup>12</sup> *Basketeria Stores v. Shelton*, 199 N.C. 746, 155 S.E. 863 (1930); *Hedrick*

of this exception to fires attributable to the lessee's negligence depends on the intention of the parties to the lease<sup>13</sup> and there is a conflict of authority whether the lessee will be exculpated from his own negligence. The earlier cases construed an exception of "fire" as meaning only accidental fire, and therefore the lessee was liable for loss due to his negligence.<sup>14</sup> The trend of the more recent cases<sup>15</sup> has been to construe the lease so that the tenant is exempted from liability for loss resulting from his own negligence.<sup>16</sup> This construction has been primarily attributable to a provision which obligates the lessor to assume the payment of insurance premiums on the theory the parties intended the lessee to receive the benefit of the insurance by exculpation.<sup>17</sup>

### PUBLIC POLICY

The law seems well settled that either party to a lease may exempt himself from liability for his own negligent acts resulting in injury to the premises,<sup>18</sup> and such a construction is not against public policy.<sup>19</sup>

v. Pack, 106 W. Va. 322, 145 S.E. 606 (1928); Kennedy v. Loose Willes Biscuit Co., 194 Pa. Super. Ct. 602 (1928); Karl v. Jackson, 12 Ohio App. 477 (1920).

<sup>13</sup> Cerny-Pickas & Co. v. C.R. Jahn Co., 7 Ill. 2d 393, 131 N.E. 2d 100 (1956); Carstens v. Western Pipe and Steel Co., 142 Wash. 259, 252 Pac. 939 (1927); 51 C.J.S., *Landlord and Tenant* §414 at p. 1162 (1947).

<sup>14</sup> Carstens v. Western Pipe and Steel Co., *supra* note 13; Brophy v. Fairmont Creamery, *supra* note 7. The lessor was relieved from liability to rebuild under a covenant to rebuild where the fire was caused by the lessee's negligence. Morris v. Warner, 207 Cal. 498, 279 P. 152 (1929).

<sup>15</sup> With the exception of Winkler v. Appalachian Amusement Co., 238 N.C. 589, 19 S.E. 2d 185 (1954), discussed in text accompanying note 44, *infra*.

<sup>16</sup> Cf. Lathrop v. Thayer, 138 Mass. 466, 52 Am. Rep. 286 (1885), in which a tenant at will was held not liable for loss to the leased premises caused by his negligence since such acts were "permissive waste" and not "voluntary waste." This exemption did not extend to reckless acts. The reasoning was that the cost of the risk was included in the rent paid. This decision was discussed in Gade v. National Creamery Co., 324 Mass. 515, 87 N.E. 2d 180 (1949), where the court approved *Lathrop*, "at least in so far as an omission [by the tenant] to safeguard."

<sup>17</sup> General Mills, Inc. v. Goldman, 184 F. 2d 359 (8th Cir. 1950), *cert. denied* 340 U.S. 947 (1950), the case is discussed in annot., 20 A.L.R. 2d 1353; Hardware Mutual Insurance Co. v. C. A. Snyder, Inc., 137 F. Supp. 812 (W.D. Pa. 1956), 17 U. PITT. L. REV. 509 (1956); United States Fire Insurance Co. v. Phil-Mar Corp., 166 Ohio St. 85, 139 N.E. 2d 330 (1956); Cerny-Pickas & Co. v. C. R. Jahn Co., *supra* note 13; Kansas City Stock Yard Co. v. A. Reich and Sons, Inc., 250 S.W. 2d 692 (Mo. 1952), 6 VAND. L. REV. 408 (1952); Slocum v. Natural Products, 292 Mass. 455, 198 N.E. 747 (1935).

<sup>18</sup> See *supra* note 13. Also 51 C.J.S., *Landlord and Tenant* §368 at p. 1084 (1947).

<sup>19</sup> Cerny-Pickas & Co. v. C.R. Jahn Co., *supra* note 13; Jackson v. First National Bank of Lake Forest, 415 Ill. 453, 114 N.E. 2d 721 (1953); Checkley v. Illinois Central R.R. Co., 257 Ill. 491, 100 N.E. 942 (1913); 6 WILLISTON, CONTRACTS §1751A at p. 4964 (Rev. Ed. 1936). But a contract to exempt a future

An Illinois appellate court <sup>20</sup> held that a lease with the clause, "loss by fire and ordinary wear and tear excepted," was void as against public policy. This case was expressly overruled by the Illinois Supreme Court which held that the lessee was exculpated from liability by the lease provision. The court said that this was a private contract and no public interest was involved, notwithstanding the violation of certain city ordinances by the lessee.<sup>21</sup> Where the exculpation is in favor of a lessor and a personal injury is involved, the courts may find "public interest" and therefore hold the contract void as against public policy.<sup>22</sup>

There are two opposing rules of construction involved in the cases where the lease contains an exception of fire. One is that the lease shall be construed most stringently against the lessor and the other is that exculpatory contracts are not favored by law and therefore the lease will be construed stringently against the lessee.<sup>23</sup>

#### THE EFFECT OF INSURANCE ON THE LESSEE'S LIABILITY

The insurer can have no more rights than the insured.<sup>24</sup> Since the insurer's right depends on subrogation, it may be defeated by the insured's release prior to or even after loss.<sup>25</sup> Therefore the insurer cannot recover as subrogee where the insured has assumed the risk of loss by fire in a lease.<sup>26</sup>

In the absence of an express or implied provision that the insured has contracted for the benefit of the lessee or lessor, neither has any right in insurance procured by the other. Fire insurance is usually considered a personal contract and does not "run with the land."<sup>27</sup> A

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wilful tort or gross negligence is void as against public policy. 6 WILLISTON, CONTRACTS §1751B (Rev. Ed. 1936).

<sup>20</sup> Cerny-Pikas & Co. v. C. R. Jahn Co., 347 Ill. App. 379, 106 N.E. 2d 828 (1952).

<sup>21</sup> Cerny-Pickas & Co. v. C. R. Jahn Co., *supra* note 13.

<sup>22</sup> Papalos v. Shaka, 91 N.H. 265, 18 A. 2d 377 (1941); Conn. v. Manchester Amusement Co., 79 N.H. 450; 111 Atl. 339 (1920). *Contra*, Kirschenbaum v. General Outdoor Advertising Co., 289 N.Y. 489, 180 N.E. 245, 84 A.L.R. 645 (1932). This case has been abrogated by a New York statute which does not allow a lessor of an apartment building to exempt himself from liability for his negligence. N. Y. REAL PROP. LAW §234; Kean v. 34 West 34th Street Corp., 190 Misc. 914, 75 N.Y.S. 2d 498 (1947).

<sup>23</sup> Against the lessor: Hardware Mutual Ins. Co. v. C. A. Snyder, Inc., *supra* note 17. Against exculpatory effect: Carstens v. Western Steel and Pipe Co., *supra* note 13; Dinglely Lumber Co. v. Erie R. Co., 102 Ohio St. 236, 131 N.E. 723 (1921); 6 WILLISTON, CONTRACTS §§1751B, 1825 (Rev. Ed. 1936); 51 C.J.S., *Landlord and Tenant*, §414 (1947). *Cf.* Freddi-Gail, Inc. v. Royal Holding Corp., 34 N.J. Super. 142, 111 A. 2d 636 (1955).

<sup>24</sup> Hartford Fire Ins. Co. v. Chicago, M. & St. P.R. Co., 175 U.S. 91 (1899).

<sup>25</sup> Illinois Central R. Co. v. Hicklin, 131 Ky. 624, 115 S.W. 752 (1909).

<sup>26</sup> Frederick v. Great Northern Ry. Co., 207 Wisc. 234, 240 N.W. 387, modified at 241 N.W. 363 (1932).

<sup>27</sup> Miller v. Gold Beach Packing Co., 131 Ore. 302, 282 Pac. 764, 66 A.L.R.

tenant bound to rebuild must do so even though the landlord has received the insurance money for the loss;<sup>28</sup> nor does the tenant have any right to the landlord's insurance money upon rebuilding of the premises.<sup>29</sup>

An attempted assignment by the insured without the consent of the insurer is inoperative. If the consent of the insured is given then the assignment becomes a novation, the assignee being substituted for the original insured. By better opinion such assignee takes such rights as are given by the terms of the contract, freed from any defenses available against the assignors.<sup>30</sup>

#### THE STATUS OF THE LAW

*Brophy v. Fairmont Creamery*<sup>31</sup> held that a covenant in a lease to yield possession "subject to loss by fire" was intended to relate only to accidental fires and, accordingly, did not exempt a tenant from liability for fires caused by his own negligence.<sup>32</sup> A similar result was reached in *Carstens v. Western Pipe and Steel Co.*<sup>33</sup> The lessee claimed he was exculpated by the lease provision "damage by fire or the elements excepted." The court said that "Such a concession would hardly be looked for in a contract between business men." It is worthy to note that neither the *Brophy* case nor the *Carstens* case mention an insurance provision in the lease. This fact is later used to distinguish these two cases.<sup>34</sup>

The Massachusetts Supreme Judicial Court seemed to have a different attitude toward this issue in *Slocum v. Natural Products*.<sup>35</sup> The court said that the word "fire," in the clause "damage by fire or unavoidable casualty excepted," given its ordinary meaning, included fires caused by the negligence of the tenant.<sup>36</sup> This issue was handled very decisively

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858 (1929). Also see cases collected in 29 AM. JUR., *Insurance* §126, at p. 142, footnote 11.

<sup>28</sup> *Panhandle Oil Co. v. Sherrel*, 158 Miss. 810, 131 So. 263 (1930).

<sup>29</sup> *Ely v. Ely*, 80 Ill. 532 (1875).

<sup>30</sup> *American Central Insurance Co. v. Sweetser*, 116 Ind. 370, 19 N.E. 159 (1888); *Ellis v. Council Bluffs Ins. Co.*, 64 Iowa 507, 20 N.W. 782, (1884); *Fogg v. Middlesex Mutual Fire Ins. Co.*, 10 Cush. (Mass.) 337 (1852). See generally, VANCE INSURANCE §128 (3d Ed., 1951).

<sup>31</sup> 98 Neb. 307, 152 N.W. 557, L.R.A. 1918A 367 (1915).

<sup>32</sup> AMERICAN JURISPRUDENCE cites this case as authority for the general rule, 32 AM. JUR., *Landlord and Tenant*, §537 at p. 669 (1941).

<sup>33</sup> 142 Wash. 259, 252 Pac. 939 (1927). Also see 10 A.L.R. 2d 1023 (1950). The cases are generally to the effect that a lessee of premises is liable in damages to the lessor for injuries thereto resulting from a fire due to his wrongful act or negligence.

<sup>34</sup> *Cerny-Pickas & Co. v. C. R. Jahn Co.*, *supra* note 13.

<sup>35</sup> 292 Mass. 455, 198 N.E. 747 (1935). This may have been due to the influence of an earlier case involving a tenant at will, see *supra* note 16.

<sup>36</sup> See annot. 20 A.L.R. 2d 1353 (1951); also Brewer, *An Inductive Approach*

in the leading case of *General Mills v. Goldman*.<sup>37</sup> The lease contained the provision, "loss by fire and ordinary wear excepted," in addition to a clause which provided that the lessor shall insure the premises against fire. The premises were destroyed by fire and the insurance company paid the lessor \$110,000, the original purchase price and full insured value. The lessor sued in district court for negligence and the insurance company intervened. The trial court found the plaintiff was damaged to the amount of \$142,000.<sup>38</sup> The Eighth Court of Appeals reversed the district court saying that the lease, read as a whole and in the light of ordinary business practices, exempts the tenant from liability for negligence. The district court decision stimulated great interest in the insurance industry. By bringing a subrogation suit against the negligent lessee the insurance company had a possibility of recouping unexpected costs which they had computed as part of the risk on the policy issued to the landlord. Also insurers pondered the prospect of fire insurance sales to insecure tenants.<sup>39</sup> The tenant's dilemma was great because standard fire insurance policies do not cover property of others. Most public liability policies exclude liability arising from damage to the property of others in custody of the insured, and the lack of experience on the risk made rates pure guesswork.<sup>40</sup> A notable law review article<sup>41</sup> concludes that "The insurers . . . will not entirely relinquish their golden chance."<sup>42</sup>

The reaction of insurers seems to have been accurately forecast as evidenced by the number of cases deciding this issue since the *General Mills* case. The Missouri Supreme Court<sup>43</sup> cited and followed the *General Mills* doctrine, although this case did not involve a lease exception of fire. The question litigated was the exculpation of the lessee by an oral agreement to pay a higher rental for the insurance protection. The only aberration, and case not distinguishable, from the *General Mills* doctrine is *Winkler v. Appalachian Amusement Co.*<sup>44</sup> The lease provided for return of the premises in good condition, "damage by fire excepted." There was also a clause that the lessor should insure. The

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to the Liability of the Tenant for Negligence, 31 B.U.L. REV. 47 (1951), 339 INS. L. J. 263-73 (1951).

<sup>37</sup> 184 F. 2d 359 (8th Cir. 1950); approved in 35 MINN. L. REV. 603 and Brewer, *supra* note 36; disapproved in 12 U. PITT. L. REV. 452 (1951).

<sup>38</sup> This left a gain of \$32,500 by suing, instead of accepting the \$110,000 as determined by the insurer. See Brewer, *supra* note 36. If this were a subrogation suit could the insurer realize such an appreciation?

<sup>39</sup> See Brewer, *supra* note 36 at p. 49.

<sup>40</sup> Brewer, *supra* note 36 at p. 51.

<sup>41</sup> Brewer, *supra* note 36.

<sup>42</sup> Brewer, *supra* note 36 at p. 51.

<sup>43</sup> *Kansas City Stock Yards Co. v. A. Reich and Sons, Inc.*, 250 S.W. 2d 692 (Mo. 1952), 6 VAND. L. REV. 408 (1952).

<sup>44</sup> 238 N.C. 589, 79 S.E. 2d 185 (1954).

court held for the lessor, reasoning that the use of an exculpatory expression of this type in a contract was not plausible in the eyes of a businessman. The case of *Cerny-Pickas & Co. v. C. R. Jahn Company* followed the *General Mills* doctrine, holding the lessee was exculpated by the clause "loss by fire and ordinary wear excepted."<sup>45</sup> The Supreme Court of Ohio also followed the *General Mills* doctrine in *United States Fire Insurance Co. v. Phil-Mar Corp.*<sup>46</sup> litigating the clause "loss by fire and ordinary wear and decay only excepted." Exculpatory effect was given to a lease in *Hardware Mutual Insurance Co. v. C. A. Snyder, Inc.*,<sup>47</sup> applying a lease exception which read "reasonable wear and tear and accident by fire alone excepted." The district court construed the word "accident" as applying to fires caused by the lessee's negligence under Pennsylvania law. Although the court ignored the *General Mills* case, this appears to be an expansion of its rationale. The court primarily used a definitional approach, citing lexicographical authorities saying that "accident" means any event, occurrence or happening. The court also "construed the lease most strongly against the lessor."

The courts appear to have made a confusing distinction between contract and tort liability in some of these cases. Since a lease exception exculpating the lessee is not against public policy, there is no reason for such a distinction except as an aid in determining the intent of the parties. It seems clear that a lessee may modify tort liability for negligence by a contract. An Ohio Supreme Court case, *Day Wood Heel Co. v. Rover*,<sup>48</sup> may have drawn this distinction between tort and contract liability. In that case the lessor brought two separate actions, one for negligence and one on the lease. The decision concerned only the suit on the lease for breach of covenant to return the premises in good condition. The opinion expressly states the case will be confined to the alleged breach of covenant "without prejudice to rights of the parties in the action *ex delicto* pending in the court below."<sup>49</sup> The tort action appears never to have been reported. This dictum may be interpreted as indicating that there was possibly a cause of action in tort distinct from

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<sup>45</sup> *Cerny-Pickas & Co. v. C. R. Jahn Co.*, 7 Ill. 2d 393, 131 N.E. 2d 100 (1956); 44 ILL. B. J. 574. (1956). The majority opinion advanced the following arguments for exemption: (1) The lease clearly contemplates loss by fire. (2) Construed with the clause providing that the landlord shall insure the building against loss by fire it is very likely the word "fire" was used to include fires caused by negligence since this is the definition used in a standard fire insurance policy. (3) Construed against the common law background the exception would have no meaning at all unless it were intended to exempt the lessee. (4) The cost of insurance is actually being paid by the lessee in a higher rental.

<sup>46</sup> 166 Ohio St. 85, 139 N.E. 2d 330 (1956).

<sup>47</sup> 137 F. Supp. 812 (W.D. Pa. 1956), disapproved, 17 U. PITT. L. REV. 509 (1956).

<sup>48</sup> 123 Ohio St. 349, 175 N.E. 588, 20 A.L.R. 3d 1353 (1931).

<sup>49</sup> *Id.* at 351, 175 N.E. at 589.

any contractual liability, notwithstanding an intent by the parties to modify tort liability. The other possible interpretation of the dictum is that the court was adhering to the principle of confining the decision to the matters before it, i.e. an action on the contract.

The *Slocum* case<sup>50</sup> also indicates that there is a difference between a tort and a contract obligation. The Massachusetts court held that the lessee was exculpated from any contractual duty by a lease exception of fire but qualified this with a dictum, "It does not necessarily follow that the lessor would have no action in tort."

Judge Sanborn in his dissenting opinion to the *General Mills* case<sup>51</sup> uses the delineation between tort and contract in finding the parties' intent. He implies that a contract may modify tort liability but that the parties only intended to modify contractual liability to rebuild where the fire was *accidental* and not to modify liability for negligence. He said that a tenant's tort liability for negligence is quite apart from his contractual liability to pay rent or make repairs and the exceptions do not exonerate the tenant from tort liability, even though the damage is due to one of the excepted causes. The majority opinion does not recognize this delineation between tort and contract and allows the contract to have exculpatory effect. The dissent in the *Cerny-Pickas* case asserts that "such exceptions are not designed to relieve the lessee from tort liability." The majority opinion soundly rejects this schism in the parties' thinking, saying, "There are areas of the law in which the distinctions between liability in contract and in tort may be significant, despite their remote and accidental origin. We are not satisfied, however, that such distinctions are relevant in determining the meaning to be given to words used by laymen in defining their rights and obligations."<sup>52</sup>

#### OHIO LAW

The exception of fire clause has had varied interpretation in Ohio. An exception, to an express covenant to return the premises in good condition, of "damage by fire or other unavoidable casualty excepted," did not include the leaving of debris on the premises after a fire and the tenant was liable for the cost of removal.<sup>53</sup> In *Day Wood Heel Co. v. Rover*,<sup>54</sup> the lessor sued for breach of covenant to return the premises in good condition, "damage by fire or other unavoidable casualty excepted." The lessor made his case depend on an interpretation of the clause as reading "unavoidable fire." The court held this construction

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<sup>50</sup> *Supra* note 35.

<sup>51</sup> *General Mills, Inc. v. Goldman*, *supra* note 37 at p. 370-71.

<sup>52</sup> *Supra* note 45.

<sup>53</sup> *Kenton Baking Powder Co. v. Harrison*, 1 Ohio N.P. (n.s.) 245, 14 Ohio Dec. 43 (1903).

<sup>54</sup> *Supra* note 48.



would have the effect of making the lessee the insurer and he would not be liable if the lessor merely proved the fire was avoidable.

An appellate court case,<sup>55</sup> in which the lease clause read "damage by fire and other unavoidable casualty excepted," held that the tenant would not be liable for damage caused by fire *unless it appears he was negligent*. The dictum in this case indicates the lessee may have been liable if he were negligent but, of course, there was no issue of exempting the lessee from negligence.

The Ohio Supreme Court in *United States Fire Insurance Company v. Phil-Mar Corp.*<sup>56</sup> decisively held that a lease which contained an exception to the surrender clause of "loss by fire," completely exonerated the lessee from liability for loss due to his own negligence. The court reasoned that the exception clause and the clause which provided that the lessor insure, indicated intention by the parties to exculpate the lessee from loss caused by his own negligent acts as well as loss from fires caused by accident.

#### SUMMARY AND CONCLUSION

The trend of the law is definitely to construe the exception of fire clauses as an exculpatory provision, relieving the lessee from liability for his own negligence. The two opposing rules of construction, construing a lease most strictly against the lessor, or most strictly against an exculpatory contract, have merely been used by the courts as a make-weight factor in support of their particular conclusions. The two essential elements to the exculpatory construction are: (1) the existence of an exception of loss by fire and (2) the existence of fire insurance on the premises paid for by the lessor.<sup>57</sup>

The courts' only technique of ascertaining the intent of the parties is to consider extrinsic evidence and construe the language used in the lease against the local common law background. Lease exemptions of liability for fire loss through negligence are not against public policy since both parties are ordinarily free to bargain for their desired terms. Therefore the courts can only receive their mandate from the parties and should not substitute judicial for private legislation. The *G. A. Snyder* case appears to be an unjustified extension of inferential effect given to the existence of insurance<sup>58</sup> paid for by the lessor resulting in

<sup>55</sup> *Karl v. Jackson*, 12 Ohio App. 477 (1920); 24 OHIO JUR., *Landlord and Tenant* §253 at p. 1000.

<sup>56</sup> *Supra* note 46.

<sup>57</sup> The Supreme Court of Texas refused to allow the lessee to be exempted from liability for his own negligence under the lease provision, "Lessor agrees to carry his own insurance against loss by fire, etc., on the entire building". The sole contention was based on the existence of this insurance clause and there was no clause excepting fire from operation of the lease. *Wichita City Lines Inc. v. Puckett*, 295 S.W. 2d 894 (Tex. 1956).

<sup>58</sup> As previously pointed out, this does not appear to be the main reliance

alleviating the hardship on the uninsured lessee. It is extremely difficult to see how the lease exception of "accident by fire" could reasonably be thought of by the parties as excepting fire caused by the lessee's negligence.

The trend of the recent cases, exempting the lessee where there is an ordinary "loss by fire" exception, is certainly desirable as the opinions utilize a reasonable interpretation of the intent of the parties. It is significant to note that all the cases exempting the lessee from liability have involved an industrial lessee. From a practical business point of view it is not likely that a manufacturing concern would intend only to protect itself from accidental loss and not loss due to its own negligence. Where it is clear that the parties contemplate insurance to be paid for by the lessor it is logical to conclude that they intend the lessee to pay for the insurance through rent payment. It would be an undue hardship to require a tenant to insure against his own negligence where he is paying for the fire insurance which covers the premises in favor of the lessor. The lessee should not be treated as a negligent third party subject to subrogation rights, but should have the benefit of the insurance policy. Such a policy contemplates a potentially negligent occupant and a right of subrogation would be a windfall to the insurer. It would be very difficult for the tenant to procure an insurance policy since the standard fire insurance policy doesn't cover property of others and therefore there is little risk experience. Even assuming the tenant could procure such an insurance policy to cover the premises there would be some overlap of coverage between the tenant's and the lessor's policies. Since the lessee is concededly not bound under the lease for fires occurring through accident, in order to eliminate insuring the same risk twice his policy could cover only the narrow situation where he is *negligently* instrumental in damaging the premises by fire. Is such a policy feasible? If a policy covers loss by the negligence of the insured, it would ordinarily cover loss without his fault. There certainly can be no risk experience to cover so narrow a field. Rates actually would amount to a re-insuring by the lessee of the risk already covered by the lessor's policy, resulting in a double profit for the insurer. Would an insurance company reduce its premium on the lessor's policy in a case where it does have a right of subrogation against a lessee? It does not seem very likely; and even if it did the computation of a reduction would be arbitrary speculation.

There is a peripheral area deserving of mention. A recent Texas case<sup>59</sup> rejected an attempted assertion that the existence of insurance paid for by the lessor would be enough to exculpate the lessee, without

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of the court, but it is the only logical explanation for such a construction. The use of the word "accident" seems to negative the construction given by the court.

<sup>59</sup> Wichita City Lines, Inc. v. Puckett, *supra* note 57.

an exception of fire. There should be no objection to this exculpation as long as the intent of the parties can be determined from the lease and the evidence. However, since there is no lease exception of fire, this is a more remote area and the courts will be more cautious in relieving the tenant from liability.

There is an additional factor, apparently not considered in the cases, which may influence the construction of a lease which excepts "loss by fire." An insurance company may avoid a policy for breach of warranty if the premises are burdened by an additional risk without its consent and also if the exoneration of the lessee is considered in derogation of its subrogation rights. If we assume the parties know this, then it would be a reasonable inference that they contemplate notification to the insurer of a change in occupants and terms of the lease. The absence of a notification to the insurer might result in a complete shift of the burden of risk to the lessor. This is certainly not intended by the parties, as evidenced by the very existence of an insurance policy. Notification, therefore, may be an important indication of whether the parties intended the lease to have an exculpatory effect.

The most satisfactory solution is to draft the lease in such lucid terms that there will be no doubt as to who is to bear the burden of loss by fire due to the lessee's negligence: the lessee, lessor, or insurer.

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